Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES GILBERT GIBBS, ET AL.,

Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICUS CURIAE THE STATE OF ALABAMA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Amicus Curiae The State of Alabama submits this Brief in support of Petitioners because it takes seriously its obligation to ensure that the wildlife and habitat its residents enjoy today remain preserved, if not, indeed, improved, for future generations. The people of the State demand no less.

To assist in carrying out this obligation of stewardship, the State has been vested with "title and ownership of all wild birds and wild animals in the State of Alabama or within the territorial jurisdiction of the state . . . ." ALA. CODE § 9-11-230 (1987). The State then regulates hunting and fishing activities using civil and criminal laws and regulations, doing such things as: setting hunting seasons bag and catch limits; limiting or prohibiting the taking of young and female animals of some species; and putting some areas off limits to hunting. In performing this regulatory role, the State reconciles the interests of those who wish to use the land and wildlife for their immediate benefit and the interests of those who wish to preserve them. That reconciliation of interests is accomplished through the political process.

Alabama's support of Petitioners' challenge to the red wolf regulation is entirely consistent with its awareness of its stewardship. Rules like the red wolf rule that apply to private lands and to wildlife owned by the State risk destroying the unique benefits of divided and dispersed government. Such rules do not just preempt; they confuse. The exercise of federal regulatory jurisdiction over State-owned wildlife on private lands stifles the states' efforts to develop creative, even competitive, ways of preserving their heritage. In addition, it blurs responsibility, making local landowners look to a well-intentioned federal agency in Washington, D.C., for guidance on local land-use matters.

Accordingly, the State of Alabama respectfully submits this Brief in support of Petitioners. This Court should grant the petition and resolve the important, but unsettled, question of federal law that it presents.

ARGUMENT

The Fourth Circuit's decision in this case threatens the federal-state balance. In that decision, the court held that a regulation promulgated by the United States Fish and Wildlife Service that, as applied, limited the circumstances under which private property owners could "take" red wolves was constitutional. The red wolf population had been reintroduced on federal lands, but wolves had roamed onto private property threatening humans and livestock. The court reasoned that application of the red wolf rule to private property located within the State of North Carolina could be sustained as a valid exercise of Congress's power to regulate activities that "substantially affect" interstate commerce. The Fourth Circuit's expansive treatment of Congress' powers under the Commerce Clause preempts state activity and clouds lines of accountability. This Court's recognition of limits on the Commerce Clause power will help restore the federal-state balance without threatening endangered species in general or red wolves in particular.

1. Application of the Red Wolf Rule to Private Lands Cannot Be Sustained as an Exercise of Congress' Powers Under the Commerce Clause.

This Court has construed the Commerce Clause to permit regulation of three types of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate

commerce; and (3) other activities that "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 557–59 (1995). Neither the Fourth Circuit nor the Federal Respondents seek to sustain the rule by resort to the first two safe harbors. Rather, they contend that the rule can be sustained because it addresses activities that "substantially affect" interstate commerce.

Only three weeks ago, this Court expressed doubts regarding the validity of that approach when applied to migratory birds in *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, 531 U.S. ___ (2001). Although this Court did not reach the constitutional question, it did hold that the application of the Migratory Bird Rule to nonnavigable, isolated, and intrastate waters was not a valid exercise of agency regulatory authority. This Court explained that the attempt to sustain the Migratory Bird Rule by resort to the power to regulate activities that "substantially affect" commerce raises "significant constitutional and federalism questions." *Id.* at ___ (slip op. at 13). With respect to the constitutional problems, the Court explained, "[W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." The Court then noted that the outcome of that evaluation "is not clear . . . ." *Id.* With respect to federalism, the Court stated:

> Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. *See, e.g., Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a

> desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

Id. Concluding that the rule's application could not be sustained under the statute, this Court found it unnecessary to address those serious and vexing questions.

This Court should proceed to address the constitutional issue raised in this case, an issue that is almost identical to the issue raised in *Solid Waste Agency*. It is squarely and unavoidably raised. Moreover, it is likely to recur in the context of endangered species protection. In *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), for example, the court rejected a challenge to the application of the Endangered Species Act to the Delhi Sands Flower-Loving Fly, an insect that lives solely in southwestern San Bernardino County and northwestern Riverside County in California As Judge Sentelle, dissenting, observed, "The Delhi Sands Flower-Loving Fly is an inveterate stay-at-home, a purely intrastate creature." *Id.* at 1063 (Sentelle, J., dissenting). After the red wolf and the Delhi Sands Flower-Loving Fly, it is inevitable that some other endangered species will find its way onto private property and cause a criminal prosecution, the derailing of a hospital project, or other injury to State and local interests. Most important of all, however, this Court should proceed to address the constitutional question because the Fourth Circuit incorrectly applied this Court's decisions and, as a result, failed to recognize the limits to Congress' Commerce Clause powers.

Whether in upholding federal legislation or in invalidating it, this Court has long stood by the

rudimentary principle that Congress's commerce powers are not unlimited. As a matter of first principles, the Constitution creates a Federal Government of enumerated powers, all of which — the Commerce Clause included — are "subject to outer limits." *United States v. Lopez*, 514 U.S. at 557. The Commerce Clause does not "obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). "The activities that are beyond the reach of Congress are 'those within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.'" *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824)).

This Court's recent decisions have found limits to the Commerce Clause's ability to reach activities that are said to substantially affect interstate commerce. In *United States v. Lopez*, the Court held that possession of a firearm in a school zone was not an activity that substantially affected interstate commerce. Similarly, in *United States v. Morrison*, 120 S. Ct. 1740 (2000), the Court held that the Commerce Clause did not reach purely intrastate violent criminal activity. In both cases, the Court questioned whether the activity at issue was "commercial" at all. *See Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic activity, however broadly one might define those terms."); *Morrison*, 120 S. Ct. at 1751 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.")

Furthermore, in both *Morrison* and *Lopez*, the Court rejected attempts to aggregate the economic effects of

noncommercial activity. In *Lopez*, the Court rejected the suggestion that gun possession on school grounds substantially affected interstate commerce because violent crime imposes costs, deters travel, and adversely affects the learning environment. *Id.* at 564–65. In *Morrison*, the Court again rejected the argument that a substantial effect arose from a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Morrison* at 1752. The Court observed that such theories left it "hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez* at 564. Thus,

> While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity . . . thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Morrison, 120 S. Ct. at 1751.

The Fourth Circuit's rationale in sustaining the red wolf rule is just as flawed as the arguments by aggregation rejected in *Lopez* and *Morrison*. At the outset, it cannot be said that the wolves themselves are engaged in commercial activity, so the argument by aggregation is designed to justify regulation of noneconomic activity. The Fourth Circuit and the United States point to the effect of the wolves' predatory activity on local ranchers, the research and howling sessions, and the possibility of trade in pelts to provide the necessary substantial effect on interstate commerce. *See* Pet. App. 17a–24a; Br. for the Federal Respondents in Opp. at 12–14. These suggestions fail both jointly and severally.

Looking at the economic effect of the wolves' predatory activity is misguided because the Federal Respondents started the process that produces those effects. The Federal Respondents released red wolves on federal land in an attempt to reintroduce them into an area they no longer inhabited; red wolves strayed from federal lands onto private lands; and those wolves have threatened people, killed livestock, and caused other harm. The economic value of the livestock killed is part of the but-for chain of causation set in motion by the Federal Respondents. Put simply, the Federal Respondents have externalized costs that they now point to as justification for their action. *But cf. Christy v. Hodel*, 857 F.2d 1324, 1334–35 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (no takings claim for depredations of grizzly bears). The citations to scientific study and tourism are simply reiterations of the travel argument rejected in *Lopez*. *Id.* at 564 ("[V]iolent crime reduces the willingness of individuals to travel to areas with in the country that are perceived to be unsafe.") Finally, the possibility that trade in pelts may result from loosening the restrictions on taking red wolves does not require federal regulation of private property. It can constitutionally be addressed by regulating trade in pelts.

The inadequacy of these arguments leaves only biodiversity as an asserted justification for the regulation of private property. *See, e.g.*, Federal Respondents' Br. at 14–15. Once again, this is a justification that has no limits: As the Federal Respondents put it, "[I]ndividual species are part of an interdependent web, and . . . the significance of a particular species cannot always be easily determined at a given point in time." *Id.* But, as Judge Sentelle put it in his dissent in *National Ass'n of Home Builders v. Babbitt*:

> A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might someday have a medical, scientific, or economic value which could then propel it into interstate commerce. There is no stopping point. If we uphold this statute under Judge Wald's first rationale [*i.e.*, biodiversity], we have indeed not only ignored *Lopez* but made the Commerce Clause into what Judge Kozinski suggested: the "hey-you-can-do-whatever-you-feel-like clause."

130 F.3d at 1065 (Sentelle, J., dissenting) (quoting Judge Alex Kozinski, *Introduction to Volume 19*, 19 HARV. J. L. PUB. POL. 1, 5 (1995)). As with the Delhi Sands Flower-Loving Fly involved in *Home Builders*, nobody even suggests any present or foreseeable place that the red wolf population in this portion of North Carolina has in the chain of life on the planet. Such entirely speculative reasoning cannot suffice to show a substantial effect on interstate commerce.

Thus, the red wolf rule cannot be justified as a measure that regulates an activity or activities that substantially affect interstate commerce. The wolf is not engaged in commerce, and the arguments by aggregating the effects of a but-for causation chain admit of no limits. The rule is not a permissible exercise of Congress's Commerce Clause powers.

The inadequacy of the Commerce Clause as a source of authority for regulating the taking of red wolves on private property does not leave Congress powerless. Rather, Congress can use its powers under the Spending Clause to acquire habitat or to encourage States to take measures to protect endangered species generally or the red wolf in particular. *North Dakota v. United States*, 460 U.S. 300 (1983); *see also* 16 U.S.C. § 1535(a)(5) (declaring

it appropriate to "encourag[e] the States and other interested parties, through federal financial assistance and a system of incentives, to develop and maintain conservation programs . . . .") Congress or federal regulatory agencies can prohibit hunting in general or the hunting of particular species on federal lands. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). As noted above, Congress can proscribe trade in wolf pelts or other parts of wolves or other endangered species. *Andrus v. Allard*, 444 U.S. 51, 63 & n.19 (1979). Finally, endangered species that live within the navigable waters of the United States can be protected because such waters are "channels" of commerce. *Douglas v. Seacoast Products*, 431 U.S. 265 (1977).

In sum, the application of the red wolf rule to private property cannot be justified as an exercise of the Commerce Clause power. If Congress desires to protect the wolves, it must do so using a different power. It is up to the States to regulate noncommercial activities on private property within their borders, a conclusion that leads to the second major problem with the Fourth Circuit's opinion.

2. Application of the Red Wolf Rule to Private Lands Under the Authority of the Commerce Power Displaces State Regulatory Power and Upsets the Federal-State Balance.

Of the two sovereigns that claim an interest in endangered species on private lands, the States' interest is superior. The United States' interest purportedly arises from the Commerce Clause and dates back to 1973 when the Endangered Species Act became law. The States' interest is territorial and grounded in antiquity. As this Court observed more than 100 years ago , "From

the earliest traditions the right to reduce animals *ferae naturae* to possession has been subject to the control of the law giving power." *Geer v. Connecticut*, 161 U.S. 519, 523 (1896). North Carolina, where the Petitioners reside or are located, has codified this interest:

> The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole. The Department [of Environment, Health, and Natural Resources] and the Wildlife Resources Commission are charged with stewardship of these resources.

N.C. GEN. STAT. § 113-131(a) (1999); *see also* ALA. CODE § 9-11-230 (1987) (vesting "title and ownership of all wild birds and wild animals in the State of Alabama or within the territorial jurisdiction of the state" in the State). Moreover, with respect to red wolves, North Carolina has attempted to vindicate its interest. As the Petition and the lower court opinions show, the North Carolina General Assembly, the County Commissions of Hyde County and Washington County, and the North Carolina Department of Agriculture have objected to the introduction of red wolves or to the effects of their incursion on private land. Pet. at 5; Pet. App. 7a–8a, 62a–63a.

The Fourth Circuit's decision allows the Commerce Clause to be used to displace this superior State interest. One effect is to blur lines of responsibility in a way that is detrimental to the federal-state balance. In *Printz v. United States*, this Court noted that, by commandeering local chief law enforcement officials into a federal regulatory program, Congress had taken credit for solving a problem by shifting the burdens of compliance:

> By forcing state governments to absorb the financial burden of implementing a federal

> regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

521 U.S. 898, 930 (1997). A similar situation arises when endangered species on private lands are protected. In this case, the democratically elected State and local governing bodies have been deprived of the ability to regulate activity that takes place in their jurisdictions. The people of Hyde and Washington Counties and North Carolina should look to their elected representatives for a solution to any problems caused by the red wolves' incursions onto private property, but they cannot.

Beyond blurring lines of accountability, the invocation of Commerce Clause power to regulate noneconomic activity on private lands stifles State efforts. Two examples will illustrate this point. First, as the Fourth Circuit and the District Court noted in this case, North Carolina passed a conflicting red wolf law that applies to Hyde and Washington Counties and, as amended, to Beaufort and Craven Counties. Pet. App. 7a–8a, 62a–63a (citing 1994 N.C. Sess. Laws ch. 635; 1995 N.C. Sess. Laws ch. 83). Those laws provide greater protection to the owners of land and stock from the predatory activities of red wolves. Even as they afford landowners more protection, however, they are deferential to the United States Fish and Wildlife Service in that: (1) the laws are predicated on a finding that "efforts by the U.S. Fish and Wildlife Service to trap and remove wolves have not been successful in removing wolves for a significant period of time"; (2) any action by the landowner is conditioned on a

prior request that the Service remove the wolves from the landowner's property; and (3) any killing of a wolf must be reported to the Service within 48 hours. *See* 1994 N.C. Sess. Laws ch. 635. Again, while this legislation implicitly recognizes that the wolves can become pests, the injury results because the Federal Government reintroduced the wolves to nearby federal lands, the wolves, being *ferae naturae*, have roamed, and the Fish and Wildlife Service has been unable to remove the wolves from the landowner's property.

Second, with respect to a game species that is not endangered, Alabama formerly prohibited the hunting of doe and unantlered male deer. ALA. CODE § 9-11-239 (1987) (repealed 1991). Such restrictions are responsive to a scarcity of deer and help the species to propagate and survive. This statute was superseded in 1966 by a statute that allowed the Commissioner of Conservation and Natural Resources to open a season for hunting female or unantlered male deer by regulation "when, in his best judgment, he deems it necessary for biological reasons or because of crop damage to open the season on such deer . . . ." ALA. CODE § 9-11-240 (1987). Section 9-11-239 was repealed in 1991. *See* Act of Sept. 19, 1991, No. 91-750, § 2, 1991 Ala. Acts, 1st Ex. Sess. 129, 130. Clearly, the deer population of Alabama had recovered to the point where deer were becoming pests and the prohibition on hunting female or unantlered male deer was no longer necessary. Now, the Commissioner of Conservation and National Resources can adjust the hunting seasons for game and nongame animals in response to the animal population and the needs of the local community, including the hunters. In other words, the Commissioner can act as a steward of these resources.

These examples show that the States can protect the natural resources within their borders. Because of

competing political demands, not everyone is happy with what the States do. But, that unhappiness does not mean that the States are abdicating their stewardship responsibilities.

In *Lopez* and *Morrison*, this Court noted that the laws in question infringed on areas in which the States had historically been sovereign. In *Lopez*, the Court observed that the "national productivity" reasoning, which posited that guns in schools hurts education producing, ultimately, a less productive citizenry, would mean that

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.

514 U.S. at 564; *see also Morrison*, 120 S. Ct. at 1753. The States' sovereignty and regulatory authority over the lands and wildlife within their boundaries are no less historically grounded. Indeed, in *Solid Waste Agency*, this Court referred to the "States' traditional and primary power over land and water use." 531 U.S. at ___ (slip op. at 13). Just as in *Lopez* and *Morrison*, this Court should protect the federal-state balance by keeping federal regulatory activity within constitutional bounds.

CONCLUSION

For the reasons stated in the Petition and in this amicus brief, the Court should grant the writ of certiorari and, on review, reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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